In the Supreme Court of the United States

OCTOBER TERM 1976

No. 76-956

MISSISSIPPI GAY ALLIANCE AND ANNE DEBARY,
Petitioners,

vs.

BILL GOUDELOCK, et al.,
Respondents.

BRIEF OF RESPONDENTS GILES, MEYERS AND DUDLEY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinions of the lower courts are adequately presented in the petition.

JURISDICTION

The judgment of the Court of Appeals was entered on August 12, 1976. The petition for a rehearing or in the alternative a rehearing en banc was denied on October 13, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I

Whether there exists a logical nexus between the University administration and the operation of a student newspaper at Mississippi State University to establish state action in this cause.

II

Whether the First Amendment clause of freedom of the press would permit a college administration to interfere in the publication of a campus newspaper.

CONSTITUTIONAL PROVISIONS INVOLVED

This cause involves the freedom of the press clause of the First Amendment to the Constitution.

STATEMENT OF THE CASE

Mississippi Gay Alliance (MGA) is unique in the area of student publications. As the facts will reflect, this cause is clearly distinguishable from most authority, for here we have a question of whether the editor of an independent campus newspaper may, in exercising his editorial judgment, refuse to publish a submitted advertisement or must he as a matter of journalistic policy print all submissions, pall mall. At the same time *MGA* presents the rather unusual judicial request that a collegiate administration be instructed, by injunctive process, to interfere with the operation of a newspaper which is solely a student activity.

The facts of *MGA* begin with another federal action. On August 16, 1973, the plaintiff association, by and through Anne DeBary, submitted a proposed advertisement to Bill Goudelock, editor of the student newspaper at Mississippi State University, "The Reflector". The request was refused and the parties sued Goudelock requesting declaratory and injunctive relief that the "ad" be published. The district court dismissed the cause finding no state action. *Mississippi Gay Alliance* v. *Goudelock,* EC 73-95K (January 30, 1973). This, the second cause, is identical to the first action with the exception that three (3) administration officials are added parties—Dr. William L. Giles, President of Mississippi State University, and Henry F. Meyers and Sam Dudley, staff members of the Department of Communications at the institution. The addition is an apparent attempt to prove state action and falls short of the mark.

On July 17, 1974, the district court entered an order stating in part:

> ". . . [A] full evidentiary hearing on defendants' motion to dismiss, including questions of standing and other defenses in bar (except and apart from a merits consideration), be scheduled for . . . October 18, 1974 . . ."

The record indicates that the hearing was rescheduled for October 25, 1974, where the Court in its opening remarks invited stipulations, whereupon the following facts were agreed to:

1. "[T]hat the named plaintiffs in this cause are not students at Mississippi State University, nor is the Mississippi Gay Alliance a recognized student organization at that institution." *Excerpt of Proceedings,* R-28, p. 4.

2. "[T]hat no member of the Mississippi Gay Alliance was enrolled as a student at Mississippi State University."[1] *Excerpt of Proceedings,* R-28, p. 6.

3. "[T]hat Bill Goudelock was elected editor of the campus newspaper, 'The Reflector', by the student body in a student body election at Mississippi State University." *Excerpt of Proceedings,* R-28, p. 6.

4. "[T]hat funds which support the student newspaper at Mississippi State are derived from student-originated fees, private funds and other non-state funds . . . [and] . . . that the fees are collected by the university as part of a non-waivable fee which are then transmitted back to the students." *Excerpt of Proceedings,* R-28, p. 8.

5. "[T]hat their participation [of Giles, Meyers and Dudley in this episode] was of non-action and acquiescence . . . that they did not give him [Goudelock] any contrary instructions." *Excerpt of Proceedings,* R-28, p. 10.

Upon these stipulations and the facts contained in the complaint the district court found and so held that:

> "[O]n the stipulated facts before the Court, and treating the complaint as admitted throughout, there is no action shown on the part of Giles, Meyers or Dudley, University officials, which brought about the circumstances of which the plaintiffs complain. The only allegation against these officials is that they tacitly went along with the decision of the campus newspaper editor. There is no allegation or proof that they directed Goudelock not to run the advertisement, or that they censored him in any way, or that they undertook to control or sought to control his judgment in any manner whatsoever. Thus there was an utter lack of control or direction alleged or shown on the part of these three University officials. Their inaction can in no way be subject to Fourteenth Amendment principles.
>
> "Moreover, the undisputed facts are that 'The Reflector' is a campus newspaper and not an official university news organization as such; and it is operated by a student editor selected by vote of the student body. This Court is thus unable to see any connection between the operation of this newspaper, which is a student activity, and the State of Mississippi or any organ or agency of the state. The newspaper is simply a student activity conducted on the campus of a state university, and does not constitute state action in any accepted sense of the term." *Ruling of the Court,* R-26, pp. 7-8.

The Court of Appeals affirmed, and after reliance upon this Court's recent opinion in *Miami Herald Publishing Company* v. *Tornillo,* 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), stated, 536 F.2d 1073, 1075:

> "Since there is not the slightest whisper that the University authorities had anything to do with the rejection of this material offered by this off-campus cell of homosexuals, since such officials could not lawfully have done so, and since the record really suggests nothing but discretion exercised by an editor chosen by the student body, we think the First Amendment interdicts judicial interference with the editorial decision."

It is on these facts that this petition rests.

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1. By subsequent order of the District Court dated December 2, 1974, this stipulation was modified only to the extent that students at the institution were members of MGA.

ARGUMENT

I.

No State Action Can Be Proven in This Case Since the University Defendants, Giles, Meyers and Dudley, Did Not Exercise Any Control Whatever Over the Operations of the Campus Newspaper at Mississippi State University

The record in this case clearly reflects one fact: no proof has been offered to substantiate the allegations of the plaintiffs against the University defendants, Dr. William L. Giles, President of Mississippi State University, Henry F. Meyers and Sam Dudley. When this action was filed against the editor of "The Reflector", student newspaper at the institution, an attempt was made to create and establish a nexus between the University administration and the operation of the student activity so as to constitute state action. This just has not been done. The allegations directed toward these individuals are insufficient.

> "No presumptions flow from mere allegations; no one can be required, consistent with due process, to prove the absence of violation of law." *Norwood* v. *Harrison*, 413 U.S. 455, 471, 93 S.Ct. 2804, 37 L.Ed.2d 723, 735 (1973).

For the MGA to succeed, it must prove that the State or its agents have acted to deny the right(s) asserted. This it has not and cannot do; in fact,

> ". . . [T]he District Court found, on the complaint and the stipulated facts, that there was no *indication* that any University official or faculty member had anything to do with the rejection of the advertisement or the announcement; that there was a complete lack of control over the student newspaper on the part of University officials.
>
> The Court concluded that the rejection of the advertisement 'does not constitute state action in any sense of the term.' " 536 F.2d 1073, 1074-1075.

And the Court of Appeals also concluded,

> "While it is true that the student newspaper is supported, in part, by activity fees collected by the University, the students elect the editor. The complaint did not allege and the stipulations did not assert that University officials supervise or control what is to be published or not published in the newspaper." 536 F.2d 1073, 1075.

This §1983 action against the University defendants must fail. The record simply does not indicate the significant state involvement necessary to bring an otherwise private concern within constitutional strictures. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 349-359, 95 S.Ct. 449, 42 L.Ed.2d 477, 483-488 (1974); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 171-179, 92 S.Ct. 1965, 32 L.Ed.2d 627, 637-641 (1972); *Millenson* v. *New Hotel Monteleone*, 475 F.2d 736, 737, reh. en banc den. 477 F.2d 596 (5 Cir. 1973). "The Reflector" is *not* an official news organization as such; it is operated by a student editor elected by the student body. No state funds accrue to this publication, it is financed by student monies collected by a non-waivable fee. The plaintiffs have not proven the existence of a sufficiently close connection between the act of the student editor and the State. In fact, the state has no control over the paper. MGA has not shown directly or indirectly that Giles, Meyers and Dudley participated in the decision not to publish the advertisement. *Fulton*

v. *Hecht*, 545 F.2d 540 (5 Cir. 1977); *Poe* v. *Miles*, 407 F.2d 73 (2 Cir. 1968).

Additionally, it is urged by the plaintiffs that the district court ruled incorrectly on the facts presented. Rule 52(a) of the Federal Rules of Civil Procedure provides that the findings of fact by a district court in actions tried without a jury shall not be set aside unless "clearly erroneous." *United States* v. *United States Gypsum Company*, 333 U.S. 364, 394, 68 S.Ct. 525, 92 L.Ed. 746, 765 (1948). Under this rule, the determination of the factual content of ambiguities rests with the trial court, and such determination can be set aside on review only if "clearly erroneous." *Guzman* v. *Ruiz Pichirilo*, 369 U.S. 698, 702, 82 S.Ct. 1095, 8 L.Ed.2d 205, 209 (1962). The rule is also applicable insofar as the district court's conclusion is based on inference drawn from documents or undisputed facts. *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 202, 83 S.Ct. 1773, 10 L.Ed.2d 823, 842 (1963). Furthermore, since the jurisdiction of this Court is appellate, it has no authority to re-try the issues of fact de novo or substitute its judgment with respect to such issues. *United States* v. *United States Gypsum Co.*, *supra*; *Guzman* v. *Ruiz Pichirilo*, *supra*; *United States* v. *Singer Mfg. Co.*, *supra*. The function of this Court is to determine whether, as a matter of law, the findings sustain the judgment.

The courts below did not make findings as to the existence of any "forbidden acts" on the part of the named defendants. Thus, based on the record before this Court, no basis exists to determine whether any allegation presented is prohibited by the Constitution. *Meltzer* v. *Board of Public Instruction*, 480 F.2d 552 (5 Cir. 1973).

II.

The Fundamental First Amendment Right of the Press Prohibits University Interference With the Publication of a Campus Newspaper

Ironically, the president of Mississippi State University and two of his subordinates are defendants in a federal lawsuit because they followed current decisional interpretations of this Court and other lower federal courts. In its landmark opinion of *Tinker* v. *Des Moines Independent School Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731, 737 (1969), the Court succinctly stated:

> "It can hardly be argued that either students or teachers shed their Constitutional rights of freedom of speech or expression at the schoolhouse gate."

The plaintiffs' argument that the public-forum doctrine is applicable here ignores factual reality. The right to exercise editorial judgment is as much a part of the fundamental right of freedom of the press as publication of unpopular ideas, and even if the university administration were in agreement with the MGA, a demand of publication would be an impermissible and unwarranted interference into the affairs of a newspaper. A college or university, "as an instrumentality of the State may not restrict speech . . . simply because it finds the views expressed by any group to be abhorrent." *Healy* v. *James*, 408 U.S. 169, 180, 187, 92 S.Ct. 2338, 33 L.Ed.2d 266, 278-279, 283 (1972).

When stripped of all else, this case is *Bazaar* v. *Fortune*, 476 F.2d 570, aff'd en banc 489 F.2d 225 (5 Cir. 1973), cert. den. 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974) in reverse. In *Bazaar* the Court of Appeals held that the Chancellor of the University of Mississippi could not censor an on-campus publication of the English

Department known as "Images". Surely as a publication "The Reflector" is analogous to "Images". This being so, plaintiffs' request that a federal court instruct collegiate administrative officials to require a student editor to perform an affirmative act is tantamount to an abrupt rejection of the long-accepted principle reflected in *Antonelli* v. *Hammond*, 308 F.Supp. 1329, 1337 (D.C. Mass. 1970):

> "Thus in cases concerning school-supported publications or the use of school facilities, the courts have refused to recognize as permissible any regulations infringing free speech when not shown to be necessarily related to the maintenance of order and discipline within the educational process. See, e.g. Dickey v. Alabama State Board of Education, 1967, M.D. Ala., 273 F.Supp. 613; Snyder v. Board of Trustees of University of Illinois, 1968, N.D. Ill., 286 F.Supp. 927; Brooks v. Auburn University, 1969, M.D. Ala., 296 F.Supp. 188; Zucker v. Panitz, 1969, S.D.N.Y., 299 F.Supp. 102; Smith v. University of Tennessee, 1969, E.D.Tenn., 300 F.Supp. 777; Close v. Lederle, 1969, D.Mass., 303 F.Supp. 1109."

If the State and/or its educational instrumentalities are prohibited from exercising any control over a student activity which is admittedly supported by the institution, how then can it be argued that a campus newspaper, which has been found to be private in nature, 536 F.2d 1073, 1074-1075, may be told that it cannot refuse an advertisement. In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258, 94 S.Ct. 2831, 41 L.Ed.2d 730, 741 (1974):

> "A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper, and the

> decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."

CONCLUSION

Relief pursuant to §1983 cannot be had here; the plaintiffs simply have not proven state action. Besides, in a case of conflicting First Amendment rights, the freedom of the press would prohibit a university administration from interfering in the operations of an independent student newspaper. The Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I, Ed Davis Noble, Jr., Assistant Attorney General, do hereby certify that I have caused to be mailed this day by United States Postal Service a true copy of the foregoing Brief of Respondents, Giles, Meyers and Dudley in Opposition to Petition for Writ of Certiorari to:

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THIS, the 4th day of April, 1977.

ED DAVIS NOBLE, JR.